This Recommended Liability Determination was followed by a Recommended Order and Decision in the 1st Quarter of 2004.

**STATE OF ILLINOIS**

**HUMAN RIGHTS COMMISSION**

| | | |
|---|---|---|
| **IN THE MATTER OF** | ) | |
| | ) | |
| **Alfred Brown,** | ) | |
| **Complainant** | ) | |
| | ) | **CHARGE NO.: 1998 SF0804** |
| **and** | ) | **EEOC NO.: 21B 982393** |
| | ) | **ALS NO.: 10805** |
| | ) | |
| **American Highway Technology,** | ) | |
| **Respondent** | ) | |

## RECOMMENDED LIABILITY DECISION

This matter is before me following a public hearing conducted on August 24 and 25, 2000. The post-hearing brief of Complainant was filed on October 31, 2000 and that of Respondent was filed on November 8, 2000. Reply briefs were then filed by Complainant and Respondent on December 1, 2000 and December 5, 2000 respectively. There are no further submissions from the parties.

## Statement of the Case

. The complaint in this case was filed on Complainant's behalf by the Illinois Department of Human Rights on April 30, 1999 and Respondent's verified answer was filed on June 7, 1999. A scheduling order was entered on July 19, 1999 that called for a final status hearing on March 28, 2000. After a moderately contested period of discovery, the parties filed their joint pre-hearing memorandum on March 13, 2000. The original dates for public hearing (August 7 and 8, 2000) were then set by order on March 28, 2000. The hearing dates were changed to August 24 and 25, 2000 by order entered on April 6, 2000 and the case moved to its present posture as noted above. This matter is now ready for decision.

## Findings of Fact

The following facts are based upon the record of the public hearing in this matter. Factual assertions made at the public hearing, but not addressed in these findings, were determined to be unproven by a preponderance of the evidence or were otherwise immaterial to the issues at hand. Numbers 1 to 8 are those facts that were classified as "uncontested" by the parties in their joint pre-hearing memorandum, although they may be slightly edited here; these items are marked by an asterisk (*). Citations to the public hearing transcript are indicated as "Tr. ###." Joint exhibits admitted into evidence are denoted "JX-#," Complainant's exhibits are denoted "CX-#" and Respondent's exhibits are denoted "RX-#."

1. Complainant's race is black. *

2. Complainant was hired by Respondent for its Maintenance Department on October 27, 1997. *

3. At the time of his discharge, Complainant's hourly rate of pay was $15.50. *

4. Complainant received a copy of and reviewed Respondent's Employee Manual within one week of commencing employment. *

5. Respondent terminated Complainant on December 12, 1997. *

6. On June 1, 1998, Complainant filed a charge of discrimination against Respondent (No. 1998SF0804) with the Illinois Department of Human Rights. *

7. In his charge, Complainant alleged that he was harassed because of his race and then discharged on December 12, 1997 due to his complaining of such harassment on December 9, 1997. *

8. On April 30, 1999, the Illinois Department of Human Rights filed the Complaint in this case with the Commission. *

9. On December 7, 1997, Complainant was assigned to rewire a saw trolley as a

performance test. He was not advised that the outcome of this test would determine his continued employment with Respondent.

10. On December 9, 1997, Complainant submitted a written complaint concerning alleged racism in the workplace to the management of Respondent.

11. On December 11, 1997, Complainant's supervisor determined that Complainant did not satisfactorily complete the test project.

## Conclusions of Law

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/1-103(B) and 5/2-101(B)(1)(a) respectively. Further, Respondent is a person within the meaning of Section 1-103(L) and is subject to the provisions of the Act.

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. Respondent was Complainant's employer from on or about October 27, 1997 to December 12, 1997 and for all periods relevant to the complaint.

4. Complainant did not establish by a preponderance of the evidence that he was harassed by Respondent, its supervisors or employees due to his race, black.

5. However, Complainant did establish a *prima facie* case of retaliatory discharge against him by Respondent because he complained of alleged discriminatory behavior on the part of Respondent, its supervisors and employees, a protected activity under the Illinois Human Rights Act and that there is a causal nexus between the protected activity and the adverse action taken against him.

6. The nondiscriminatory reason for its discharge of Complainant articulated by Respondent is pretextual.

7. The racial harassment count of the complaint in this case should be dismissed with prejudice, while the retaliation count should be sustained.

## Discussion

*A. Outline of Essential Facts*

Complainant began employment with Respondent as a maintenance mechanic on October 27, 1997. The newspaper advertisement for this position indicated that Respondent was seeking a person with three to five years of experience in industrial maintenance and some "electrical troubleshooting and minor mechanical rebuilding" experience. JX-2. During the first 90 days of his employment, Complainant was considered to be a probationary employee. For the first week, Complainant worked 50 hours on the day shift and then he worked the same number of hours on the night shift for two weeks until the night shift was curtailed due to production considerations.

In mid-November, while he was on the day shift, Mr. Brown alleges that Steve Norder, his supervisor, called him "Buckwheat," a name that Mr. Brown took to be a racial slur. Then, on December 9, 1997, another co-worker allegedly called Mr. Brown "Sambo," another name that Complainant took to be a racial slur. After this last incident, Complainant placed a written complaint (JX-4) in the company suggestion box and was subsequently interviewed by the plant manager, Bob Centner, who then commenced an investigation. After the conversation with Mr. Centner, Complainant had a meeting the next day with another supervisor, Tim Engels, who for the first time indicated dissatisfaction with Complainant's job performance. Beginning on December 7, 1997, Engels had arranged for a "test" of Complainant's ability to restore a piece of equipment to service. After Engels determined on December 11th that Complainant did not satisfactorily complete the "test," Complainant was discharged from his employment on December 12, 1997.

*B. Racial Harassment*

Count I of the complaint alleges "(t)hat Respondent racially harassed Complainant because of his race, black, in violation of Section 2-102(A) of the (Illinois Human Rights) Act." Complaint, Count I, Paragraph Ten. In this case, Complainant alleges two incidents where racial slurs were directed at him as evidence of racial harassment. First, on or about November 15, 1997, Steve Norder allegedly called him "Buckwheat" and on December 9, 1997, a different co-worker called him "Sambo." A course of conduct is not racial harassment as contemplated by the Human Rights Act unless it becomes so pervasive that it changes the terms and conditions of the victim's employment. Village of Bellwood v. Human Rights Comm'n, 184 Ill.App.3d 339, 350-51, 541 N.E.2d 1248, 133 Ill.Dec. 810 (1st Dist. 1989). The court in Bellwood further observed that "more than a few isolated incidents of harassment, however, must have occurred." *Id.* at 350; citation omitted. The Commission has consistently enforced this interpretation of the prohibition against racial harassment. The applicable principles are summarized in Evans and Corning Revere, Inc., Ill. H.R.C. Rep. (1998SF0051, July 31, 2000)(Slip Opinion at 11-12; citations omitted): "(A)n employer must provide a work environment free of racial harassment, ridicule and disrespect. Harassment has been defined by the Commission as any form of behavior which makes the working environment so hostile and abusive that it constitutes a different term and condition of employment based on a discriminatory factor."

Complainant alleges that two racial slurs were directed at him approximately three weeks apart. While he testified that he also observed a general lack of respect in the work place for black and Hispanic employees, Complainant does not allege any other specific treatment of himself or others that would permit a determination that he was racially harassed as a matter of law. There is no pattern of harassment as described in Bellwood. It has been found that two isolated incidents of racially motivated misconduct "do not create a hostile work environment."

Jackson and College of Lake County District No. 532, Ill. H.R.C. Rep. (1999CF0619, August 12, 2002). Therefore, Complainant was not racially harassed as prohibited by the Illinois Human Rights Act. It is recommended that Count I of this complaint be dismissed with prejudice.

*C. Retaliation*

In Count II of the complaint, it is charged that Respondent retaliated against Complainant for complaining about racial misconduct by discharging him on December 12, 1997. The standard for proving a retaliation allegation is that: 1) the Complainant engaged in a protected activity; 2) the Respondent committed an adverse act against him; and, 3) there is a causal nexus between the protected activity and the adverse act. Maye v. Illinois Human Rights Comm'n, 224 Ill.App.3d 353, 360, 586 N.E.2d 550, 166 Ill.Dec. 592 (1st Dist. 1991). Here, Respondent concedes the first two steps in the process (that the complaint registered by Complainant on December 9, 1997 was a protected activity, and that discharge is an adverse act). Respondent's Post-Hearing Brief at 16. I find that there is nothing in the record to make this concession unjust or unreasonable. Therefore, this discussion will focus only on the third element, *i.e.*, whether there is a causal nexus between the protected activity and the adverse act.

As noted, the protected activity was the written form Complainant placed in the company suggestion box on December 9, 1997 in which he complained "about racism in the work place." JX-4. Complainant met with the plant manager that same day and three days later, Complainant was discharged. It is troubling when the alleged retaliatory adverse act occurs within a short time after the protected activity asserted by the Complainant. The Illinois Appellate Court, in a case arising from the Commission, has found that even as much as a 90-day gap between the protected activity and the alleged retaliatory action is suspicious and can satisfy this prong of the retaliation analysis. Maye at 362. Here, there was a gap of only three days between the

submission of the written complaint and the discharge of Complainant. This alone is sufficient to establish the causal nexus required by the *prima facie* case.

However, in this case, it is necessary to examine the entire course of events between December 7 and December 12, 1997 before a conclusion of retaliatory discharge can be affirmed. Tim Engels, Complainant's day shift supervisor, claimed that he observed deficiencies in Complainant's work ethic and performance and that he made contemporary notes of these problems. However, he had no conversation about deficiencies with Complainant until "somewhere ... around the first (part) of December (1997)" Tr. 286-87. Then, according to his testimony, Mr. Engels devised a test for Complainant to commence on December 7, 1997 – to wire an electric trolley on the saw table. Tr. 290. Pursuant to the test, another employee disassembled all of the wiring and it was then presented to Complainant for rewiring.

Prior to commencing the test, Complainant was not informed that the outcome would determine his continued employment with Respondent. It must be remembered that the advertisement that attracted Complainant to Respondent called for "some troubleshooting experience with electronics." The applicant was not required to be a journeyman, master electrician or electrical engineer. The Complainant was presented with a test in which the entire wiring of the device was intentionally disassembled. This did not create a situation that called for "troubleshooting" as might be necessary when a single wire might become disconnected or a single switch might malfunction. Thus, while it may be reasonable to use such a test to determine the level of Complainant's competence with electrical matters, as it seemed to be when the test was instituted on December 7th, it was not reasonable to then base a decision about his continued employment on the outcome of the test without warning. It is highly suspicious that all discussion of Complainant's alleged deficiencies and his discharge arose after he submitted his complaint on December 9th.

While Respondent may have been concerned about Complainant's progress as an employee prior to December 9th, there is no indication that management was contemplating his discharge. The intervening event that gave rise to the desire of management to discharge Complainant was the filing of his racism complaint on December 9th. Although Mr. Engels and Mr. Centner embarked on what they characterized as an investigation, the thrust of their reaction was to become defensive and attack Complainant. The failure of Complainant to successfully rewire the saw trolley then became the pretext they needed to discharge Complainant only three days after he engaged in the protected activity of complaining about racism in the workplace. There is no evidence that Complainant was aware that his continued employment hung in the balance depending on the result of the saw trolley test. The discharge was retaliatory and it is recommended that the Commission sustain the allegation of retaliatory discharge found in Count II of the complaint.

*D. Damages*

It is recommended that the Commission find Count II of the complaint to be sustained and that Count I be dismissed with prejudice. Accordingly, it is necessary to determine the recommended award to be given Complainant with regard to Count II.

**Backpay --** In all sustained cases, it is the Commission's charge to make the prevailing complainant whole. The award may have both monetary and non-monetary elements. Where a complainant is found to be wrongfully discharged, he or she will most often be eligible for backpay consisting of the difference between what he or she should have received in salary but for the discriminatory conduct of the respondent and the amount actually received through other employment during the applicable time period. In this case, Complainant is claiming backpay for two years after the date of discharge because at that time he began to receive a wage higher than he was receiving from Respondent.

At the time of discharge, Complainant was working approximately 50 hours per week at the rate of $15.50 per hour. This is $775.00 per week or $3,358.33 per month ($775.00 x 4-1/3). He was unemployed from December, 1997 through June, 1998, or seven months. His backpay for this period is $23,508.31. Complainant was employed by Kelly Services, a temporary agency, for work at Sears, Roebuck for the period of July, 1998 to November, 1998. He earned $6.00 per hour while working 70 hours per week, a total of $420.00 per week or $1,820.00 per month. There was a deficit of $1,538.33 per month for five months, a total of $7,691.65. Complainant then began to work for Revell Contracting where for the first year, he earned $14.00 per hour for 40 hours per week, or $560.00 per week and $2,426.67 per month. This represents a deficit of $931.66 per month, a total of $11,179.92 for a year. Subsequently, Complainant began to earn more than $15.50 per hour after the first year with Revell and does not make any claim for further backpay. Therefore, the amount of backpay proven in this case is $42,379.88.

**Mitigation --** Respondent asserts that Complainant should not receive back pay because he failed to mitigate his damages by seeking and obtaining suitable employment sooner than he did. The Commission recognizes failure to mitigate damages as an affirmative defense for which the burden of proof lies with Respondent. The steps for proving failure to mitigate are found in Golden and Clark Oil and Refining Corporation, Ill. H.R.C. Rep. (1978CF0703, July 3, 1991): "First, the respondent must prove that there were substantially equivalent positions which were available. Second, the respondent must prove that the complainant failed to use reasonable care and diligence in seeking such positions." In this case, Respondent did assert failure to mitigate damages as an affirmative defense in its answer. Answer, Sixth Defense, at page 3. However, the record is completely devoid of any attempt by Respondent to introduce evidence supporting the first prong of the Golden test. In fact, Respondent, which did not provide any

argument regarding damages in its initial post-hearing brief, does not even discuss the "equivalent positions" element in its post-hearing reply brief. This alone is sufficient to deny Respondent's claim of failure to mitigate damages. However, I further find that the uncontradicted testimony provided by Complainant on the issue of his post-discharge employment search indicates that he was diligent in seeking new full-time employment and did find full-time employment approximately seven months after the discharge.

**Emotional Distress --** Complainant also alleges he suffered emotional distress and requests an award to compensate him for this injury. It has long been established that the Commission's statutory authority to award a prevailing complainant his or her actual damages includes the ability to award monetary damages for emotional distress. Village of Bellwood v. Illinois Human Rights Comm'n, 184 Ill.App.3d 339, 355, 541 N.E.2d 1248, 133 Ill.Dec. 810 (1st Dist. 1989). Complainant testified that after his termination, he was held in less esteem in his community because it was perceived that he had not stood firm in the face of discriminatory behavior on the part of his former employer. Further, he had difficulty in sleeping and eating after the discharge until he began his employment at Sears. Tr. 86-87.

Respondent asserts that Complainant should only receive a minimal award for emotional distress because Complainant "was not hospitalized for any of the alleged problems, and he did not even seek treatment from any health care professionals." Respondent's Reply Brief 10. However, the Commission has never formulated a standard that mandates the submission of medical evidence to support an award of damages for emotional distress. As noted above, the Appellate Court in Bellwood, a case in which no medical evidence of emotional distress was adduced, affirmed the ability of the Commission to award damages for emotional distress. Later, in ISS International Service System v. Illinois Human Rights Comm'n, 272 Ill.App.3d 969, 980, 651 N.E.2d 592, 209 Ill.Dec. 414 (1st Dist. 1995), the court found that the award made for

emotional distress was inadequate and it admonished the Commission to "examine more closely the injury caused by the offending party" in setting such awards. As in Bellwood, the testimony of the complainant alone in ISS was sufficient to support the award without additional medical evidence. Rys & Palka and ISS International Service System, Inc., Ill. H.R.C. Rep. (1985CF0850, 1985CF2238 (Cons.), March 13, 1992) *(incorporating Recommended Order and Decision, May 8, 1991 and Interim Recommended Order and Decision, December 28, 1990)*.

I find that Complainant did suffer emotional distress over and above that which would be expected from "the mere fact of a civil rights violation." Harris and Vinylgrain Industries of Illinois, Ill. H.R.C. Rep. (1996CA1087, August 1, 2001). Therefore, Complainant is entitled to an award for emotional distress. He has suggested $25,000.00 as the appropriate amount to compensate him for his emotional distress. Although it is clear that Complainant is entitled to an award for emotional distress as discussed above, the weight of the evidence he produced at the public hearing supports an award at the lower end of the range of such awards currently being approved by the Commission. Therefore, I find that an award in the amount of $5,000.00 for emotional distress is fair and reasonable under all of the circumstances presented by this case. I would note that both the backpay and emotional distress awards discussed here are fully attributable to the violation of the Human Rights Act described in Count II of the complaint and should not be subject to reduction because of the recommendation that Count I be dismissed.

Other elements of the recommended award, not requiring additional analysis, are specified in the recommendation summary below.

## Recommendation

Complainant has established by a preponderance of the evidence that he was subjected to unlawful retaliatory discharge as specified in Count II of the complaint. However, Complainant failed to prove by a preponderance of the evidence that he was subjected to racial harassment as alleged in Count I of his complaint. Accordingly, it is recommended that Count II be sustained and that Count I be dismissed with prejudice. It is further recommended that Respondent be found liable for an award under the Illinois Human Rights Act with regard to Count II. Accordingly, it is recommended that Complainant be awarded the following relief:

A. That Respondent pay to Complainant back pay in the amount of $42,379.88, plus interest on this element of this award pursuant to Section 5300.1145 of the Commission's Procedural Rules, to accrue until payment in full is made by Respondent (the accrual of interest shall not be stayed as provided by Paragraph G below);

B. That if Complainant remains desirous of employment with Respondent, he be reinstated at a rate of pay comparable and commensurate with that which he would now be paid if the civil rights violation had not occurred, and that all seniority and other benefits in his favor be fully restored to Complainant;

C. That Respondent pay to Complainant the amount of $5,000.00 for the emotional distress suffered by him as a result of the retaliatory conduct of Respondent;

D. That Complainant's personnel file or any other file kept by Respondent concerning Complainant shall be purged of any reference to this discrimination charge, this litigation and the outcome of the litigation;

E. That Respondent cease and desist from retaliating against its employees in violation of Section 6-101(A) of the Illinois Human Rights Act;

F. That Respondent pay to Complainant the reasonable attorney's fees and costs incurred as a result of the civil rights violation that is recommended to be sustained in this Recommended Liability Decision, that amount to be determined after review of a properly submitted motion with attached affidavits and other supporting documentation meeting the standards set forth in Clark and Champaign National Bank, 4 Ill. H.R.C. Rep. 193 (1982), to be filed within 21 days after the service of this Recommended Liability Determination. If such a motion is not timely filed, it will be taken as a waiver of attorney's fees and costs;

G. That if Respondent disputes the amount of requested attorney's fees, it must file a written response to Complainant's motion within 21 days of the service of that motion. Failure to do so will be taken as evidence that Respondent does not contest the amount of such fees. Complainant may file a reply within 14 days after service of Respondent's response; and,

H. Except as otherwise noted above, the relief recommended in Paragraphs A through F shall be stayed pending issuance of a Recommended Order and Decision including resolution of any motion for attorney's fees and costs.

HUMAN RIGHTS COMMISSION

ENTERED: BY: _____
DAVID J. BRENT
ADMINISTRATIVE LAW JUDGE
January 2, 2003 ADMINISTRATIVE LAW SECTION

**Service List for Brown #10805 as of 1/2/03:**

Bruce M. Bozich
Bozich, Beran & Soldat
11800 South 75th Avenue
Suite 302
Palos Heights, Illinois 60463

Peter K. Newman
Greenebaum, Doll & McDonald PLLC
255 East Fifth Street
2800 Chemed Center
Cincinnati, Ohio 45202-4728

Office of the General Counsel
Illinois Department of Human Rights
100 West Randolph Street
Suite 10-100
Chicago, Illinois 60601